

GETTING SOMETHING FOR NOTHING: ARE EMPLOYEE BENEFITS AN ENTITLEMENT OR A GRATUITY?

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I. SURVEY PERIOD SYNOPSIS

Are employee benefits an entitlement that vests and cannot be taken away from the employee? Or are they an enticement offered by and subject to the generosity of the employer? Many of the cases decided by the Fifth Circuit Court of Appeals this term focused on this issue. For example, in *Weir v. Federal Asset Disposition Ass'n*, the Fifth Circuit held that employees who were offered severance as an inducement to remain with an agency that would

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soon be dissolved were entitled to severance pay even if they accepted jobs with a successor agency and suffered no unemployment.¹ In *International Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, the court held that retirees were entitled to lifetime medical benefits when the collective bargaining agreement promised benefits "until death," even though the employer reserved its right to amend the plan.² In *Fallo v. Piccadilly Cafeterias, Inc.*, the court held that a beneficiary who complied with the terms of a summary plan description was entitled to continuation of health insurance coverage, even though the beneficiary was not entitled to those benefits under the terms of the plan.³ In *Wegner v. Standard Insurance Co.*, the court held that a participant was entitled to receive disability payments based on pay of \$300 per day, rather than on his former pay of \$10.75 an hour.⁴ The court rejected the employer's argument that amounts in excess of \$10.75 an hour were overtime pay and, therefore, excluded for the purpose of computing disability payments.⁵

But not all of the plaintiffs won. When the court believed that a plaintiff was abusing the system to get something for nothing, the court rejected the claim. For example, in *Thibodeaux v. Continental Casualty Insurance Co.*, the court refused to allow an employee to take advantage of his employer's generosity by continuing to receive disability payments when he was capable of performing other, less strenuous duties.⁶ Likewise, in *Hypes ex rel. Hypes v. First Commerce Corp.*, the court refused to order the reinstatement of a chronically-ill employee who was repeatedly absent from work when the employee offered no proof that his absences were a consequence of his illness.⁷ Additionally, in *Dowden v. Blue Cross & Blue Shield, Inc.*, the court upheld the plan administrator's denial of benefits to a participant who suffered complications from a silicone breast implant that was excluded from coverage under the plan.⁸ Finally, the court in *Nickel v. Estate of Estes* showed its intolerance for a plan administrator who filed an interpleader action in an attempt to convince the court that benefits should be paid to the children of the deceased participant rather than to his cousins, who were entitled to the benefits under the plain terms of the plan.⁹ Judge Reynaldo Garza dissented, saying that "I find it difficult to believe that [the participant] would want his hard-earned money to go to someone other than his immediate family."¹⁰

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1. 123 F.3d 281, 287 (5th Cir. Sept. 1997).
 2. 122 F.3d 228, 230 (5th Cir. Sept. 1997).
 3. 141 F.3d 580, 584 (5th Cir. May 1998).
 4. 129 F.3d 814, 821 (5th Cir. Dec. 1997).
 5. *See id.*
 6. 138 F.3d 593, 595 (5th Cir. Apr. 1998).
 7. 134 F.3d 721, 723 (5th Cir. Feb. 1998) (*per curiam*).
 8. 126 F.3d 641, 643 (5th Cir. Sept. 1997).
 9. 122 F.3d 294, 298 (5th Cir. Sept. 1997).
 10. *Id.* at 303 (Garza, J., dissenting).

Some cases were not as clear cut. In *Spacek v. Maritime Ass'n*, the Fifth Circuit had the opportunity to decide whether or not a suspension of benefits clause, as applied to a retiree who began working for a union employer, violated the anticutback rule of the Employee Retirement Income Security Act (ERISA).¹¹ The court held that a suspension of benefits, as distinguished from a reduction in benefits, is permitted under Department of Labor regulations and does not violate the anticutback rule.¹²

In *Branson v. Greyhound Lines, Inc.*, the Fifth Circuit held that the plan administrator acted properly when it denied experience-based seniority to an employee who returned to work after ten years to cross the picket line and work for Greyhound during a strike.¹³ The court rejected the employee's argument that the plan trustees, half of whom the union appointed, denied his seniority because of animus against strike-breakers.¹⁴

A secondary theme ran through the Fifth Circuit cases. Many of the employee benefit cases concerned the proper standard of review in benefit denial cases. It remains surprising that as the tenth anniversary of *Firestone Tire and Rubber Co. v. Bruch* approaches, many plan administrators' decisions are still reviewed de novo because the plan does not confer discretionary authority on the plan administrator to construe the terms of the plan.¹⁵

Other cases decided this term addressed issues involving collateral estoppel and inadequate support for summary judgments. In *Stafford v. True Temper Sports*, the Fifth Circuit held that an employee who was fired for gross misconduct and appealed the denial of his unemployment compensation benefits was collaterally estopped from bringing an action under ERISA section 510 when the parties would relitigate the same issues.¹⁶ In *Barhan v. Ry-Ron, Inc.*, the court held that summary judgment was improperly granted for the plan when the plan administrator did not adequately support his motion with affidavits.¹⁷

11. 134 F.3d 283, 288 (5th Cir. Jan. 1998).

12. *See id.*

13. 126 F.3d 747, 749 (5th Cir. Oct. 1997).

14. *See id.*

15. 489 U.S. 101, 115 (1989) (holding that plan administrators' decisions are "to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to . . . construe the terms of the plan").

16. 123 F.3d 291, 293 (5th Cir. Sept. 1997).

17. 121 F.3d 198, 200 (5th Cir. Sept. 1997).

II. ENTITLEMENT: PLAINTIFFS WHO WON

A. Severance Plan as a "Pay-to-Stay" Benefit

Weir v. Federal Asset Disposition Ass'n is one of the clearest cases dealing with entitlement that the Fifth Circuit decided during the survey period.¹⁸ In *Weir*, the Fifth Circuit heard the appeal of a class action brought by eighty-three former employees of the Federal Asset Disposition Association (FADA), a short-lived successor to the Federal Savings and Loan Insurance Corporation, for benefits under FADA's severance plan.¹⁹ The former employees sought severance pay even though they had not suffered any period of unemployment.²⁰

From its inception, FADA was a controversial agency. Three years after its creation, Congress attempted to disband FADA.²¹ In response to employees' concerns about job security, FADA's board of directors adopted a severance plan providing that if Congress did dissolve FADA, "each employee who is in FADA's employ on the date of termination shall be paid, in one lump-sum payment," a severance amount equal to more than four months' salary.²²

In 1989, Congress passed the Federal Institutions Reform, Recovery, and Enforcement Act (FIRREA),²³ which required the liquidation of FADA within 180 days of its enactment.²⁴ FADA employees contended that they were told that "FADA would close, and that their jobs would terminate on 31 December 1989."²⁵ By December 15, the Federal Deposit Insurance Corporation (FDIC) and the Resolution Trust Corporation (RTC) had offered the former employees of FADA comparable jobs.²⁶ Former employees who rejected these job offers were terminated as of January 5, 1990.²⁷ Employees who accepted the job began work for FDIC or RTC on January 2, 1990.²⁸

The former employees applied for severance pay, and as a result, the plan administrator determined that the former employees were not eligible for severance benefits.²⁹ A class action was filed seeking a review of the

18. 123 F.3d 281 (5th Cir. Sept. 1997).

19. *See id.* at 284.

20. *See id.*

21. *See id.*

22. *Id.*

23. Pub. L. No. 101-73, 103 Stat. 183 (1989) (codified as amended in scattered sections of 5 U.S.C., 12 U.S.C., 18 U.S.C., and 31 U.S.C.).

24. *See id.*

25. *Weir*, 123 F.3d at 285.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

administrator's decision.³⁰ However, the trial court affirmed the administrator's decision, and the class-action plaintiffs appealed.³¹

The Fifth Circuit reviewed the administrator's decision de novo because the plan did not confer to the plan administrator discretionary authority to construe the plan.³² The court examined each of the severance policies at issue.³³ Policy 820 was adopted on May 3, 1988 and "provided that employees terminated as a result of a reduction in force or job elimination necessitated by business reasons would receive, among other benefits, a lump sum separation payment at the time of termination equal to between one-half (½) and two (2) months pay depending on length of service."³⁴ The Fifth Circuit upheld the denial of benefits under Policy 820 because it was not a "Pay to Stay" policy³⁵—a policy "designed to reward solely those services and loyalties of those employees who remained at FADA until its termination."³⁶ Severance pay under Policy 820 was triggered only by employees who were terminated because of a reduction in force or job elimination required by business necessity.³⁷ The FADA employees were terminated because they rejected job offers by the FDIC and RTC, and therefore, they were not entitled to benefits under Policy 820.³⁸

The First Addendum amended Policy 820 on September 29, 1988.³⁹ This amendment provided that "if FADA's charter was . . . dissolved by act of Congress, 'each employee who [was] in FADA's employ on the date of termination shall be paid, in one lump-sum payment, an amount of money . . . equal to his or her then-current monthly salary, for four months.'"⁴⁰ This benefit supplemented the amounts provided under Policy 820.⁴¹

The Fifth Circuit reversed the lower court's decision with respect to the First Addendum, which was a Pay to Stay Policy.⁴² The court noted that the purpose of the First Addendum, as clearly articulated in the plan, was to encourage employees to remain employed by FADA, whose future was bleak.⁴³ The First Addendum did not make payment of severance benefits

30. *See id.*

31. *See id.*

32. *See id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

33. *See id.* at 285-87.

34. *Id.* at 284.

35. *See id.* at 286-87.

36. *Id.* at 286.

37. *See id.* at 287.

38. *See id.*

39. *See id.* at 284.

40. *Id.* (quoting the First Addendum).

41. *See id.*

42. *See id.* at 287.

43. *See id.* The purpose of the First Addendum was to "provide assurance to personnel that if proposed legislation is successful and FADA's charter is withdrawn, [such personnel] will have a *reasonable period of opportunity, with income, to pursue other gainful employment.*" *Id.* (alterations in original). The objective was "to ensure that FADA will retain the services of its employee base and not

contingent on unemployment; rather, payment was contingent only on FADA's dissolution.⁴⁴ Because FADA was dissolved, the former employees were entitled to severance pay, regardless of whether they were unemployed.⁴⁵

On May 2, 1989, the Second Addendum revised Policy 820.⁴⁶ The Second Addendum did not affect the First Addendum, but provided that any employee

who, between May 2, 1989 and the Expiration Date, is given notice of termination of employment by FADA, for any reason other than cause, shall be entitled to the Severance Benefits, . . . *provided, however*, that no Severance Benefits shall be payable pursuant to this subparagraph if, prior to the giving of notice of termination of employment by FADA: (i) a Sale shall have occurred, and (ii) the Successor shall have made a Comparable Offer of Employment to such employee[.]⁴⁷

The Fifth Circuit held that the lower court did not err in denying severance benefits to former FADA employees under the Second Addendum, which was not a Pay to Stay Policy.⁴⁸ The Second Addendum included in its definition of "sale," "any transfer of the right to appoint or elect Directors constituting a majority of the Board of Directors of FADA."⁴⁹ When Congress enacted FIRREA, "the FDIC acquired the right to appoint all of FADA's directors."⁵⁰ Thus, a sale occurred.⁵¹ The panel reasoned that because a sale had occurred and comparable offers of employment had been made, the former FADA employees were not entitled to severance benefits under the Second Addendum.⁵²

The court quickly addressed two other issues of particular concern to plaintiffs' counsel: estoppel and punitive damages.⁵³ In dicta, the court recognized that in order to prove estoppel based on written documents that "purport to amend plan terms," the participant must establish (1) a material misrepresentation, (2) reasonable and detrimental reliance on the misrepresentation, and (3) extraordinary circumstances.⁵⁴ The court held that the former employees' estoppel claim must fail because they did not prove

lose personnel through attrition because of justifiable concerns about the dissolution of FADA." *Id.*

44. *See id.*

45. *See id.*

46. *See id.* at 284.

47. *Id.* (alterations in original) (quoting the Second Addendum).

48. *See id.* at 288.

49. *Id.*

50. *Id.*

51. *See id.*

52. *See id.*

53. *See id.* at 290.

54. *Id.*

reliance on a material misrepresentation.⁵⁵ The court stated that “[w]here, as here, a plan participant is in possession of a written document notifying her of the conditional nature of benefits, her ‘reliance on employer representations regarding benefits may never be “reasonable.” ’ ”⁵⁶

In addressing the punitive damages issue, the court clarified that the Supreme Court’s recent decision in *Varity v. Howe*⁵⁷ did not hold that “plan participants, under ERISA [s]ection 502(a)(3), can now recover extracontractual damages as a form of ‘appropriate equitable relief’ from a plan fiduciary in his or her individual capacity.”⁵⁸ The Fifth Circuit interpreted the Supreme Court’s ruling in *Varity* as being limited to the availability of injunctive relief under ERISA section 502(a)(3).⁵⁹

B. Vesting of Retiree Health Benefits

International Ass’n of Machinists & Aerospace Workers v. Masonite Corp. is another entitlement case.⁶⁰ The general rule involved in *Masonite* is that retiree lifetime benefits are not vested unless the employer has expressed a clear intention that such benefits are guaranteed.⁶¹ With this rule in mind, the Fifth Circuit reversed the district court’s ruling in *Masonite* that retirees were not entitled to lifetime health insurance benefits.⁶² The court held that the collective bargaining agreement provision relating to lifetime benefits was ambiguous; therefore, the court remanded the case to the district court for further proceedings.⁶³

Until 1993, employees of Masonite Corporation were entitled to free lifetime health insurance coverage equal to or greater than the amount provided by the collective bargaining agreement in effect on the date they retired.⁶⁴ In May 1993, Masonite unilaterally reduced retiree benefits for all employees who had retired before January 16, 1993.⁶⁵ The affected retirees filed a class action suit in which they alleged that their retiree health benefits were vested for life and were required to be paid at an amount at least equal to benefits provided in 1987.⁶⁶

55. *See id.*

56. *Id.* (quoting *In Re Unisys Corp. Retiree Medical Benefit “ERISA” Litig.*, 58 F.3d 896, 908 (3d Cir. 1995)).

57. 516 U.S. 489 (1996).

58. *Weir*, 123 F.3d at 290.

59. *See id.* at 291.

60. 122 F.3d 228 (5th Cir. Sept. 1997).

61. *See United Paperworkers Int’l Union v. Champion Int’l Corp.*, 908 F.2d 1252, 1261 (5th Cir. 1990).

62. *See Masonite*, 122 F.3d at 230.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

The parties filed cross-motions for summary judgment.⁶⁷ The district court granted Masonite's motion, holding that the retirees' entitlement to retirement benefits expired at the same time that the relevant collective bargaining agreement expired.⁶⁸ This ruling would have allowed Masonite to reduce, amend, or eliminate retiree health benefits as soon as the bargaining agreement expired.

The Fifth Circuit stated that welfare benefits, including health insurance benefits, vest only by contractual provisions.⁶⁹ Retirees have the burden to prove that their benefits are vested.⁷⁰ The Fifth Circuit held that "[i]n making this determination, the core issue is whether the parties intended to vest retiree health insurance benefits or whether they intended to tie those benefits to the [collective bargaining agreement] in effect at the time the claimants retired."⁷¹

In its opinion, the court cited *U.A.W. v. Yard-Man, Inc.*,⁷² in which the Sixth Circuit inferred that retiree benefits are vested benefits.⁷³ In deciding that the parties intended the retiree benefits to be vested, the Sixth Circuit stated that

retiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue so long as the beneficiary remains a retiree.⁷⁴

Thus, if the *Yard-Man* approach were to be applied in *Masonite*, then the retirees would be entitled to receive lifetime health insurance.⁷⁵ However, the Fifth Circuit had previously disagreed with the approach the Sixth Circuit took in *Yard-Man*, at least to the extent that an inference always exists that retiree benefits are vested.⁷⁶ The court noted that although contractual obligations usually will terminate on the expiration of the collective

67. *See id.*

68. *See id.*

69. *See id.* at 231 (citing *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 934-35 (5th Cir. 1993)).

70. *See id.*

71. *Id.* (citing *Keefer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir. 1989); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988)).

72. 716 F.2d 1476 (6th Cir. 1983).

73. *See Masonite*, 122 F.3d 231 (citing *Yard-Man*, 716 F.2d at 1482).

74. *Yard-Man*, 716 F.2d at 1482.

75. *See id.*

76. *See United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1261 n.12 (5th Cir. 1990).

bargaining agreement, “[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement.”⁷⁷

The court examined the collective bargaining agreements entered into between Masonite Corporation and the International Association of Machinists and Aerospace Workers from 1974 through 1993 to determine if the retiree health benefits had vested.⁷⁸ Each agreement stated that “[e]mployees retiring at age 62 or later . . . will be entitled to comprehensive medical expense insurance benefits for themselves and their covered dependents *until the death of the retired employee*.”⁷⁹ The court stated that the phrase “until [the] death of the retiree” appears to be “highly probative of [an] intent to vest benefits.”⁸⁰

The retiree health benefit provision was part of an Insurance Benefits Agreement that was incorporated into the collective bargaining agreement by reference.⁸¹ The term of the Insurance Benefits Agreement was “coincident with that of the [collective bargaining agreement].”⁸² The termination clause, however, applied to the entire Insurance Benefits Agreement, not just retiree benefits.⁸³ The Insurance Benefits Agreement dictated the terms of all benefits including those of active employees and their dependents.⁸⁴ The court held that “[w]hile the duration of any benefits that are subject to renegotiation may be tied to the duration of the [collective bargaining agreements], if the ‘until death’ clause reflects the parties’ intent that retiree benefits are vested, then the termination of the [Insurance Benefits Agreement] would not affect those vested benefits.”⁸⁵

The court also rejected Masonite’s argument that a reservation-of-rights clause in its ERISA plan made it clear that the retirees’ health benefits were not vested.⁸⁶ The reservation-of-rights clause specified that the employer “shall have the right to terminate, suspend, withdraw, amend or modify this Plan in whole or in part at any time.”⁸⁷ The court agreed that if a collective bargaining agreement does not dictate benefits under the employer’s plan, then this reservation-of-rights clause might support the employer’s conclusion.⁸⁸ However, the Fifth Circuit admonished that “[a] reservation-of-

77. *Masonite*, 122 F.3d at 232 (quoting *Litton Fin. Printing v. NLRB*, 501 U.S. 190, 207 (1991)).

78. *See id.*

79. *Id.* (alterations in original).

80. *Id.* (quoting *Anderson v. Alpha Portland Indus. Inc.*, 836 F.2d 1512, 1518 (8th Cir. 1988)).

81. *See id.*

82. *Id.*

83. *See id.*

84. *See id.*

85. *Id.* (citing *Litton Fin. Printing v. NLRB*, 502 U.S. 190, 207 (1991)).

86. *See id.*

87. *Id.*

88. *See id.* (citing *In re Unisys Corp. Retiree Med. Ben. “ERISA” Litig.*, 58 F.3d 896, 902-05 (3d Cir. 1995); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 934-35 (5th Cir. 1993); *Alday v. Container Corp.*, 906 F.2d 660, 665 (11th Cir. 1990)).

rights clause in a plan document . . . cannot vitiate contractually vested or bargained-for rights. To conclude otherwise would allow the company to take away bargained-for rights unilaterally."⁸⁹

The Fifth Circuit concluded that the phrase "until death" is ambiguous and could be construed so as to limit retiree health benefits or so as to vest them.⁹⁰ Therefore, the lower court erred because it did not consider extrinsic evidence of intent.⁹¹ The Fifth Circuit remanded the case so that the district court could consider such extrinsic evidence.⁹² However, in its decision the court explained that "[i]f the agreements grant vested retiree benefits, then neither the fact that the [Insurance Benefits Agreement] is coincident with the [collective bargaining agreement] nor the reservation-of-rights clause in the Plan would divest retired employees of those benefits."⁹³

Additionally, the court summarily rejected the retirees' claim that the employer breached its fiduciary duty, as suggested in *Varity Corp. v. Howe*.⁹⁴ The retirees claimed that the employer had misled the retirees by stating that the new plan provisions were "an effort to reduce 'the sky rocketing cost of quality health care.'" ⁹⁵ The court held that "[t]his statement, far from being deceptive, is literally true" and, therefore, was not misleading.⁹⁶

C. Entitlement to Continuation Coverage

In *Fallo v. Piccadilly Cafeterias, Inc.*, the Fifth Circuit held that a beneficiary who complied with the terms of a summary plan description was entitled to an extension of health insurance continuation coverage, even though the summary plan conflicted with the actual plan.⁹⁷ In *Fallo*, Scott Fallo ceased working for Piccadilly Cafeterias in February 1992.⁹⁸ He extended his health benefits under the applicable provisions of the Consolidated Budget Reconciliation Act of 1985 (COBRA).⁹⁹ Fallo timely paid all insurance premiums.¹⁰⁰ In January 1993, Fallo's wife, Kasey, became

89. *Id.* (citing *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1297 (6th Cir. 1991); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1261 (5th Cir. 1990)).

90. *See id.*

91. *See id.* at 233-34.

92. *See id.* at 234.

93. *Id.* at 233.

94. *See id.* at 234 n.5 (citing 516 U.S. 489 (1996)). The Supreme Court in *Varity* held that an employer, which also served as an ERISA plan administrator, breached its fiduciary duty by inducing plan beneficiaries through "deliberate deception" to "switch employers and thereby voluntarily release [the company] from its obligation to provide them benefits." *Varity*, 516 U.S. at 493.

95. *Masonite*, 122 F.3d at 234 n.5.

96. *Id.*

97. 141 F.3d 580, 584 (5th Cir. May 1998).

98. *See id.* at 581.

99. *See id.*; 29 U.S.C. §§ 1162, 1163, 1166 (1994), amended by 29 U.S.C.A. §§ 1162(2)(A)(v), 1166(a)(3) (West 1999).

100. *Fallo*, 141 F.3d at 581.

pregnant.¹⁰¹ As a diabetic, Kasey had serious complications with her pregnancy.¹⁰² The Fallos' COBRA coverage was scheduled to end on August 25, 1993.¹⁰³ On August 23, Scott Fallo's father notified the plan administrator by certified mail that Kasey was disabled by her pregnancy and requested an extension of her COBRA coverage.¹⁰⁴ The Fallos mailed a check to cover the insurance premiums.¹⁰⁵ However, on September 8, the plan administrator responded and stated that coverage would not be extended unless Kasey obtained a determination of disability from the Social Security Administration within sixty days of August 25, the date the initial COBRA coverage expired.¹⁰⁶

After the plan administrator denied the benefits, the Fallos sued for benefits and damages under ERISA and the Americans with Disabilities Act (ADA).¹⁰⁷ The district court held that the ADA did not apply and that in order to receive the COBRA extension for an additional eleven months, the Fallos had to apply for a Social Security Administration determination within the initial eighteen months of COBRA coverage.¹⁰⁸ Because it was unclear when the Fallos applied for a Social Security Administration determination, the district court refused to grant summary judgment and stayed the proceedings until the Social Security Administration determined whether Kasey was eligible for benefits.¹⁰⁹

Subsequently, the Social Security Administration determined that Kasey was disabled between March 1993 and October 1994¹¹⁰ and that the application had been filed on April 14, 1994.¹¹¹ As a result of these determinations, the Fallos moved for summary judgment for the additional eleven months.¹¹² Piccadilly filed a cross-motion contending that the Fallos were not entitled to an extension of coverage because they had filed for a Social Security Administration determination after the initial continuation coverage lapsed.¹¹³ The district court granted Piccadilly's motion and denied the Fallos' motion.¹¹⁴ The Fallos appealed.¹¹⁵

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101. *See id.*
102. *See id.*
103. *See id.*
104. *See id.*
105. *See id.*
106. *See id.* at 582.
107. *See id.*
108. *See id.*
109. *See id.*
110. *See id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.*

The Fifth Circuit reversed the district court's judgment and held that the Fallos had met all of the requirements for an additional eleven months of coverage.¹¹⁶ Under ERISA, qualified participants and beneficiaries may extend their health coverage for eighteen months after a "qualifying event" such as termination of employment.¹¹⁷ The participant or beneficiary may extend coverage for an additional eleven months if disabled under Title II or XVI of the Social Security Act.¹¹⁸ The disability must have been present at or within sixty days of the qualifying event.¹¹⁹

Although Scott Fallo's father notified the plan administrator of Kasey's disability before the initial COBRA coverage expired, the Fallos had not received a Social Security Administration determination by the required date.¹²⁰ On its face, it would appear that the Fallos had no claim. The summary plan description, however, provided support for the Fallos' contention.¹²¹ The summary plan provided that: "the eighteen (18) month period may be extended for an extra eleven (11) months (to twenty-nine (29) months) if a person is determined to be disabled (for Social Security disability purposes) and the Employer is notified of that determination with[in sixty] (60) days."¹²² The summary plan description did not require the beneficiary to submit the Social Security Administration determination to the plan administrator before the end of the initial eighteen month period.¹²³ Additionally, the summary plan did not require the beneficiary to be disabled at the time of the qualifying event.¹²⁴

When a summary plan description conflicts with the actual plan, the Fifth Circuit has routinely held that the provisions of the easy-to-read summary are controlling.¹²⁵ The court stated that "[t]he beneficiaries do not need to look to the language of the [p]lan to fill any gaps left by the [summary plan] provisions because such a requirement would undermine the purpose of a simple, easy to understand summary."¹²⁶ The court held that the Fallos had met the requirements of the summary plan by obtaining a Social Security disability determination and notifying the plan administrator of this determination within sixty days.¹²⁷

116. *See id.* at 583.

117. 29 U.S.C. § 1162(2)(A)(v) (1994), amended by 29 U.S.C.A. § 1162(2)(A)(v) (West 1999).

118. *See id.*

119. *See id.*

120. *See Fallo*, 141 F.3d at 581-82.

121. *See id.* at 584.

122. *Id.*

123. *See id.*

124. *See id.*

125. *See id.* (citing *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981 (5th Cir. 1991)).

126. *Id.*

127. *See id.*

D. Entitlement to Disability Based on Current Earnings

In *Wegner v. Standard Insurance Co.*, the Fifth Circuit affirmed the district court's interpretation of "overtime pay" for purposes of calculating disability benefits.¹²⁸ The court held that Wegner was entitled to benefits based on his daily compensation of \$300 rather than his former pay of \$10.75 per hour.¹²⁹ On July 22, 1991, Robert Wegner, an employee of CRC-Evans Pipeline, Inc., got the promotion of a lifetime; he was elevated from his hourly position in Houston, for which he was paid \$10.75 per hour, to a salaried position in Las Vegas.¹³⁰ For the Las Vegas job, he was paid \$300 per day for working twelve hours a day, seven days a week.¹³¹ This change in status was to last until the completion or termination of the project.¹³²

On September 4, 1991, Wegner fell from a truck while working and injured his shoulder and elbow.¹³³ On September 21, his employer transferred him back to the Houston job at an hourly rate of \$10.75.¹³⁴ As a result, Wegner applied for disability benefits.¹³⁵

The disability plan paid benefits equal to sixty percent of the employee's predisability earnings.¹³⁶ The plan defined predisability earnings as the employee's "monthly rate of earnings from [the] EMPLOYER including commissions and deferred compensation, but excluding bonuses, overtime pay and any other extra compensation."¹³⁷ The plan further provided the following:

If you become DISABLED, the . . . PREDISABILITY EARNINGS used to compute your LTD BENEFIT will be based on your monthly rate of earnings in effect on your last full day of ACTIVE WORK before you became DISABLED. Any change in the amount of your monthly rate of earnings which is approved or becomes effective after that last full day of ACTIVE WORK will have no effect on the amount of your . . . PREDISABILITY EARNINGS used to compute your LTD BENEFIT for that period of DISABILITY.¹³⁸

128. 129 F.3d 814, 823 (5th Cir. Dec. 1997).

129. *See id.* at 821.

130. *See id.* at 816.

131. *See id.*

132. *See id.* at 817.

133. *See id.*

134. *See id.*

135. *See id.*

136. *See id.*

137. *Id.*

138. *Id.*

Sounds pretty clear that Wegner was entitled to disability benefits based on the \$300 per day rate.¹³⁹ But Standard Insurance, the disability provider, based Wegner's benefits on the \$10.75 per hour rate.¹⁴⁰ Wegner filed suit claiming that his disability pay should be based on his daily rate of compensation.¹⁴¹ Standard Insurance filed a motion for summary judgment arguing that the daily rate of \$300 was overtime and was excluded under the policy.¹⁴² The district court ruled in favor of Wegner.¹⁴³ Under Wegner's interpretation, he was entitled to future disability benefits of \$5,459.58 per month and past due benefits of \$221,846.40.¹⁴⁴

The Fifth Circuit reviewed de novo the district court's grant of summary judgment.¹⁴⁵ The court noted that the de novo review was appropriate under ERISA because discretionary authority had not been granted to the administrator.¹⁴⁶ The court said that it must interpret plan provisions, such as overtime, " 'in an ordinary and popular sense as would a person of average intelligence and experience' such that the language is given its generally accepted meaning if there is one."¹⁴⁷

The term "overtime" and the phrase "any other extra compensation" were not defined in the disability plan, but the Fifth Circuit held that the terms were not ambiguous and must be given their ordinary meaning.¹⁴⁸ The court concluded that "[a] person of average intelligence and experience, reading these terms of limitation in the policy, would conclude that Wegner's \$300 per day salary at the [Las Vegas] project did not constitute overtime or any other extra compensation."¹⁴⁹

The court rejected Standard Insurance's argument "that a person working [twelve] hours a day, [seven] days a week must be working overtime."¹⁵⁰ Overtime pay typically only applies to hourly employees, and Wegner was working as a salaried employee at the Las Vegas project.¹⁵¹ Likewise, the court held that the \$300 daily rate was not "extra compensation."¹⁵² The daily rate was Wegner's normal compensation at the time of the accident and "in no

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See id.* at 817-18.

145. *See id.* at 818.

146. *See id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

147. *Id.* (quoting *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1451 n.1 (1995)).

148. *See id.*

149. *Id.*

150. *Id.*

151. *See id.* at 819 (citing *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990); *Banks v. City of N. Little Rock*, 708 F. Supp. 1023, 1024 (E.D. Ark. 1988)).

152. *Id.*

way was it 'extra.' Wegner contracted to work long hours and to be paid a flat salary for doing so."¹⁵³

The court also rejected Standard Insurance's contention that the Las Vegas job was a temporary aberration from Wegner's usual hourly wage of \$10.75 and, therefore, was extra compensation.¹⁵⁴ Wegner's employment records did not indicate that Wegner's position was temporary.¹⁵⁵ He was to remain as a full time employee for the duration of the project.¹⁵⁶ The court commented that "the happenstance of Wegner's being injured less than two months into the assignment, thus causing his compensation to revert back to \$10.75 per hour, [did not lead to the conclusion] that the \$300 daily rate was temporary."¹⁵⁷ The court further noted that even if Wegner's compensation was temporary, it did not follow that it was extra compensation.¹⁵⁸

III. ABUSING THE GENEROSITY OF THE EMPLOYER: PLAINTIFFS WHO LOST

A. Disabled Employees Who Refuse to Accept Less Strenuous Positions

Thibodeaux, a meat-cutter with Winn Dixie, applied for long-term disability after he injured his back in a car accident.¹⁵⁹ He was awarded total disability benefits under a policy issued by Continental Casualty.¹⁶⁰ Later, his doctors certified that Thibodeaux could perform "light or sedentary work."¹⁶¹ Based on these medical evaluations, Continental Casualty determined that Thibodeaux was no longer disabled and stopped payments.¹⁶² Thibodeaux sued, and the district court held that Continental Casualty had properly terminated Thibodeaux's benefits.¹⁶³

The Fifth Circuit reviewed the plan administrator's interpretation of the plan de novo because the administrator did not have discretionary authority to determine benefits.¹⁶⁴ The court reviewed the administrator's factual determinations, however, for abuse of discretion.¹⁶⁵ The Fifth Circuit summarized these principles by stating that "[w]hen we review factual determinations, we can consider only the evidence that was available to the

153. *Id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *Id.* at 820.

158. *See id.*

159. *See Thibodeaux v. Continental Casualty Ins. Co.*, 138 F.3d 593, 594 (5th Cir. Apr. 1998).

160. *See id.*

161. *Id.*

162. *See id.*

163. *See id.*

164. *See id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

165. *See id.* at 595 (citing *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991)).

administrator; however, in reviewing interpretations of a plan, we can consider evidence that was unavailable to the administrator."¹⁶⁶

Under the facts of *Thibodeaux v. Continental Casualty Insurance Co.*, a participant was totally disabled under the terms of the plan if he was "unable to perform the duties of an occupation for which [he was or would] become qualified by education, training, or experience."¹⁶⁷ Thibodeaux argued that the court should ignore the plan and follow the Louisiana rule providing that a person is totally disabled if he "cannot perform the substantial and material parts of his job in the usual way."¹⁶⁸

The Fifth Circuit rejected Thibodeaux's argument, holding that ERISA's savings clause exempts from preemption state laws that regulate insurance.¹⁶⁹ In *Pilot Life Insurance Co. v. Dedeaux*, the Supreme Court upheld the three-factor test that courts commonly apply to determine whether an insurance practice falls under the "business of insurance" as defined by the McCarran-Ferguson Act.¹⁷⁰ A particular practice that is considered "the business of insurance" is not subject to ERISA preemption.¹⁷¹ The Act defines the business of insurance in terms of "whether the practice has the effect of transferring or spreading a policyholder's risk; . . . whether the practice is an integral part of the policy relationship between the insurer and the insured; and . . . whether the practice is limited to entities within the insurance industry."¹⁷²

Thibodeaux presented the Fifth Circuit with a case of first impression with respect to the interplay between state law and the savings clause.¹⁷³ The Fifth Circuit looked to the Seventh Circuit for guidance.¹⁷⁴ In *Hammond v. Fidelity & Guaranty Life Insurance Co.*, the Seventh Circuit rejected a widow's claim that she was entitled to life insurance under the plan because her husband was disabled.¹⁷⁵ The plan extended life insurance coverage for a year if upon death the insured was totally disabled.¹⁷⁶ The widow argued that her husband, who committed suicide, was mentally and physically incapable of working at all because he had a narcissistic personality disorder.¹⁷⁷ The widow sought to apply Illinois law to interpret the plan.¹⁷⁸

166. *Id.* (citing *Southern Farm Bureau Life Ins. Co. v. Moore*, 993 F.2d 98, 102 (5th Cir. 1993)).

167. *Id.*

168. *Id.* (citing *Rodriguez v. American Standard Life & Accident Ins. Co.*, 553 So. 2d 479 (La. Ct. App. 1989)).

169. *See id.*; 29 U.S.C. § 1144(b)(2)(A) (1994).

170. 481 U.S. 41, 48 & n.2 (1987) (citing 15 U.S.C. § 1012 (a)).

171. *See id.*

172. *Id.* at 48-49 (quoting *Union Labor Life Ins. Co. v. Primero*, 458 U.S. 119, 129 (1982)).

173. *See Thibodeaux*, 138 F.3d at 595.

174. *See id.*

175. 965 F.2d 428, 430-31 (7th Cir. 1992).

176. *See id.* at 428.

177. *See id.* at 429.

178. *See id.*

The Seventh Circuit refused to apply state law and said, "We cannot imagine any rational basis for the proposition that state rules of contract interpretation 'regulate insurance' within the meaning of" ERISA's savings clause.¹⁷⁹ The court also noted that such a ruling would defeat Congress's efforts to prevent a patchwork of state law regulation.¹⁸⁰ In *Thibodeaux*, the Fifth Circuit agreed that "ERISA preempts state law governing insurance policy interpretation."¹⁸¹ Therefore, the Fifth Circuit held that the definition of total disability was governed by the plan.¹⁸²

Next, the court determined whether Continental Casualty's decision was an abuse of discretion.¹⁸³ According to the plan, Thibodeaux could be considered totally disabled only if he was physically incapable of performing a job for which he was qualified by education, training, or experience.¹⁸⁴ His doctors said he could perform light or sedentary work.¹⁸⁵ A vocational rehabilitation expert testified that Thibodeaux was qualified to perform many jobs that required only light or sedentary work.¹⁸⁶ Therefore, the court held that the district court did not err in concluding that Continental Casualty had properly terminated Thibodeaux's benefits.¹⁸⁷

B. Employees Who Refuse to Work Without Medical Documentation

The Fifth Circuit also felt no sympathy for David Hypes, the plaintiff in *Hypes ex rel. Hypes v. First Commerce Corp.*¹⁸⁸ Hypes was fired on December 31, 1994 for excessive tardiness and absenteeism.¹⁸⁹ Hypes sued his employer for violations of the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA), various state discrimination acts, intentional state discrimination acts, and intentional infliction of emotional distress.¹⁹⁰ After his employer filed a motion for summary judgment, Hypes moved one month before trial for leave to amend his complaint to allege an ERISA section 510 violation.¹⁹¹ The magistrate denied Hypes's motion for leave to amend and granted

179. *Id.* at 430; see 29 U.S.C. § 1144 (b)(2)(A) (1994).

180. See *Hammond*, 965 F.2d at 430.

181. *Thibodeaux*, 138 F.3d at 596.

182. See *id.*

183. See *id.*

184. See *id.*

185. See *id.*

186. See *id.*

187. See *id.*

188. 134 F.3d 721 (5th Cir. Feb. 1998) (per curiam).

189. See *id.* at 723.

190. See *id.*; 42 U.S.C. §§ 12101-12213 (1994), amended by 42 U.S.C.A. § 12209(1)-(7) (West Supp. 1998); 29 U.S.C. §§ 621-634, 2601-2654 (1994), amended by 29 U.S.C.A. §§ 623(j)(1), 633a(a) (West 1999).

191. See *Hypes*, 134 F.3d at 723; see also *infra* notes 217-18 and accompanying text (explaining ERISA section 510).

summary judgment in favor of the employer.¹⁹² Hypes appealed the Magistrate's refusal to grant leave to amend.¹⁹³

The facts of the case were as follows. First Commerce Corporation hired Hypes in February 1993 as a loan review analyst.¹⁹⁴ In April 1994, Hypes was reassigned to the Commercial Portfolio Team.¹⁹⁵ This reassignment was prompted by "a pattern of improperly documented absenteeism and tardiness, which naturally led to [Hypes's] inability to complete reports and projects on time."¹⁹⁶ The absenteeism and tardiness were a result of illness;¹⁹⁷ however, Hypes had not given his supervisor proper medical documentation to support this claim.¹⁹⁸

After Hypes was reassigned, his absenteeism continued.¹⁹⁹ Between July 1 and August 5, Hypes was absent for seven days and worked five half days.²⁰⁰ On August 5, Hypes was diagnosed with chronic obstructive lung disease, and he was hospitalized for tests on August 15.²⁰¹ On August 25, Hypes's doctor advised First Commerce that he could not yet determine the date of Hypes's medical release and that any restrictions imposed on Hypes would be temporary.²⁰² First Commerce placed Hypes on short-term disability from August 8 through August 29 and advised Hypes that if he used his vacation pay, he could remain on leave until September 9.²⁰³

Hypes's doctor released him free of medical restrictions on September 12, and Hypes returned to work on September 13.²⁰⁴ He informed his supervisors that it would be "difficult if not impossible" to get to work by 8:30 a.m. and requested an accommodation.²⁰⁵ He also requested permission not to wear a necktie.²⁰⁶ These requests were denied because they were not supported by a doctor's statement.²⁰⁷ On September 19, Hypes's doctor advised First Commerce in writing that travel "might be exceedingly difficult for Hypes at that time, but did not identify any restrictions or limitations affecting [Hypes's] ability to attend work regularly, punctually and in appropriate attire."²⁰⁸

192. See *Hypes*, 134 F.3d at 723.

193. See *id.* at 724.

194. See *id.*

195. See *id.*

196. *Id.*

197. See *id.* at 724 n.1.

198. See *id.*

199. See *id.* at 724.

200. See *id.*

201. See *id.*

202. See *id.*

203. See *id.*

204. See *id.*

205. *Id.*

206. See *id.*

207. See *id.*

208. *Id.* at 724-25.

After Hypes returned to work, his absenteeism not only continued but increased.²⁰⁹ Yet he still offered no medical documentation to support his absenteeism.²¹⁰ On December 31, 1994, "Hypes was fired for excessive unexplained absenteeism."²¹¹

Hypes sued First Commerce for intentional discrimination under the ADA, ADEA, FMLA, and the Louisiana Age Discrimination in Employment Act.²¹² The district court denied his motion for leave to amend the complaint to file a claim under ERISA section 510.²¹³ The Fifth Circuit reviewed the lower court's decision for abuse of discretion and noted that "a district court does not abuse its discretion by refusing to allow an eleventh-hour amendment."²¹⁴ Hypes filed his motion for leave to amend "seven months after the amendment deadline, eleven months after the original complaint was filed and one month before the trial date, which by that time had been scheduled for almost eight months."²¹⁵ The Fifth Circuit did not address the issue of delay because summary judgment would be required on the ERISA claim.²¹⁶

ERISA section 510 states:

It shall be unlawful for any person to discharge . . . a participant . . . for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan²¹⁷

In order to recover under ERISA section 510, Hypes had to show that his employer specifically intentionally discriminated against him or interfered with his potential eligibility for long-term benefits under the plan.²¹⁸ The lower court correctly determined that Hypes was fired for excessive absenteeism.²¹⁹ As a team member, "it was critical to the performance of his

209. *See id.* at 725.

210. *See id.*

211. *Id.*

212. *See id.* at 723, 725.

213. *See id.*; 29 U.S.C. § 1140 (1994); *see also infra* notes 217-18 and accompanying text (explaining ERISA section 510).

214. *Hypes*, 134 F.3d at 728; *accord* *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1199-1200 (5th Cir. 1995) (finding that a district court did not abuse its discretion when it denied a motion for leave to amend a complaint 10 months after the deadline in a situation where any new issue could have been asserted before the deadline).

215. *Hypes*, 134 F.3d at 728.

216. *See id.*

217. *Id.* (quoting 29 U.S.C. § 1140 (1994)).

218. *See Hines v. Massachusetts Mut. Life Ins. Co.*, 43 F.3d 207, 209 (5th Cir. 1995); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992).

219. *See Hypes*, 134 F.3d at 728.

essential functions for Hypes to be present in the office regularly and as near as possible to normal business hours."²²⁰

In upholding the district court decision, the Fifth Circuit stated in its per curiam decision that "[i]t would be nonsensical for this court to remand this matter to the district court so that Hypes might amend his complaint to add a claim under [s]ection 510 of ERISA, only to have the district court properly grant summary judgment on that claim."²²¹ The court held that the issue of whether the district court properly denied the amendment was rendered moot because it would be futile.²²²

*C. Employees Who Expect the Plan to Pay for Complications
Arising from Cosmetic Surgery*

Dowden v. Blue Cross & Blue Shield is yet another per curiam decision issued this term in which the Fifth Circuit agreed that the plaintiff was improperly trying to get something for nothing.²²³ Annie Dowden sued Blue Cross & Blue Shield of Texas for denying payment of expenses incurred in treating complications arising from a silicone breast implant.²²⁴ The Fifth Circuit held that the plan had properly denied the claims, which the policy excluded because they were not medically necessary.²²⁵

In determining whether Blue Cross properly denied the claims, the court analyzed the actions of the plan administrator under an abuse of discretion standard because the plan granted discretionary authority to Blue Cross to determine coverage and interpret the plan.²²⁶ The court held that Dowden failed to meet her burden of proving that Blue Cross arbitrarily concluded that the treatments were not medically necessary.²²⁷ The court found that Blue Cross followed its "established procedure and policy for processing claims involving silicone breast implant patients."²²⁸ The court rejected Dowden's argument that medical experts should determine whether or not a particular treatment is medically necessary, with great deference being given to the attending physician.²²⁹ The court concluded that "[t]o grant conclusive weight

220. *Id.* at 727; *see also* *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (stating that regular attendance is necessary for most jobs); *Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (stating that most jobs involve teamwork accomplished under supervision).

221. *Hypes*, 134 F.3d at 728.

222. *See id.*

223. 126 F.3d 641, 642 (5th Cir. Sept. 1997) (per curiam).

224. *See id.*

225. *See id.* at 643-44.

226. *See id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

227. *See id.* at 644.

228. *Id.*

229. *See id.*

to the opinion of the attending physician would vitiate the discretionary authority expressly granted to Blue Cross."²³⁰

The court also rejected Dowden's claim that it was unjust for the district court to defer to Blue Cross's interpretation of the plan.²³¹ The Fifth Circuit has repeatedly held that "[f]ederal courts owe due deference to an administrator's factual conclusions that reflect a reasonable and impartial judgment."²³² Therefore, there was no abuse of discretion.²³³

D. Plan Administrators Who Want to Pay Their Choice of Beneficiary—Not the Participant's Choice

Nickel v. Estate of Estes involved the designation of plan beneficiaries.²³⁴ Benny Estes, a former employee of the Phillips Petroleum Company, was vested in the company's Thrift Plan.²³⁵ He designated his parents as equal primary beneficiaries of the benefits.²³⁶ However, he failed to designate any contingent beneficiaries.²³⁷

When Benny died, he was survived by his mother and his two children, Lisa and Clifford.²³⁸ His vested benefit at the time of his death was valued at \$322,112.²³⁹ Benny's mother, Lurline, was entitled to the benefits under the terms of the plan.²⁴⁰ However, she died three weeks after Benny and before she had received the benefits.²⁴¹ Additionally, she did not designate a beneficiary, and her only potential heirs were her sister, Annie, and her grandchildren, Lisa and Clifford.²⁴²

The plan provided that:

[e]ach Participant or entitled Beneficiary may designate a primary Beneficiary or Beneficiaries, and a contingent Beneficiary or Beneficiaries to receive distributions due upon a person's death . . . After receipt by the [Phillips' Thrift Plan] Committee such Beneficiary designation shall take effect as of the date the form was signed by the Participant or entitled Beneficiary, whether or not he is living at the time of such receipt . . . If no such designation is on file . . . the Participant's or entitled Beneficiary's

230. *Id.*

231. *See id.*

232. *Id.* at 644-45.

233. *See id.* at 645.

234. 122 F.3d 294 (5th Cir. Sept. 1997).

235. *See id.* at 295.

236. *See id.* at 295-96.

237. *See id.* at 296.

238. *See id.*

239. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

surviving spouse, surviving children in equal shares, surviving parents in equal shares, surviving sisters and brothers in equal shares, or his estate, in that order of priority, shall be conclusively deemed to be the Beneficiary designated to receive such benefits . . . If any Beneficiary of an entitled Beneficiary, whether primary or contingent, dies before receiving the full distribution of any interest he has become entitled to, his estate shall receive the remaining distribution.²⁴³

This provision clearly entitled Benny's aunt Annie (his mother's sister) to the benefits.²⁴⁴ However, Annie died seven months after her sister, and at the time of her death, she had not received any benefits.²⁴⁵ In her will, Annie left her estate equally to her three children (Benny's cousins) and her step-child (Benny's step-cousin).²⁴⁶ Under the will, if valid, the benefits would be paid to the four cousins.²⁴⁷

But things were not meant to be this easy for Benny's beneficiaries. The executor of Lurline's estate signed a document disclaiming all of Lurline's interest in the plan benefits.²⁴⁸ The effect of this disclaimer, if valid, was to deem that Lurline predeceased Benny.²⁴⁹ The issue before the court was whether the disclaimer was valid.²⁵⁰ The parties agreed that if the disclaimer was valid, under the terms of the plan Benny's children would be entitled to the benefits, and if invalid, Benny's cousins would be entitled the benefits.²⁵¹

Uncertain of the disclaimer's validity, Phillips Petroleum's plan administrator brought an interpleader action against Lurline's estate, Annie's estate, and the children and cousins; as a result, counterclaims proliferated.²⁵²

243. *Id.*

244. *See id.*

245. *See id.*

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.* The plan provided as follows:

[I]n the event that a Beneficiary or an entitled Beneficiary signs and delivers to the Committee a written disclaimer of Plan benefits which satisfies the [Internal Revenue] Code's requirements to be tax qualified, and such benefits, but for the disclaimer, would otherwise pass to such person as a result of the death of a Participant or entitled Beneficiary, the person executing such disclaimer of benefits shall be deemed to have failed to survive the deceased Participant or entitled Beneficiary from whom he otherwise would have taken. For such disclaimer to be considered effective for purposes of the Plan, the disclaimer must be received by the Committee prior to the earlier of the date which is 9 months after the death of the Participant or entitled Beneficiary, or the date on which such person has requested any Plan transaction involving such Plan benefits. In the event that Plan benefits are distributed to the Beneficiary or entitled Beneficiary prior to the receipt of such disclaimer, pursuant to the other terms of the Plan, such distribution shall completely release and relieve [Phillips and others] on account of and to the extent of any payment made before receipt of the disclaimer.

Id. at 296-97.

250. *See id.* at 297.

251. *See id.*

252. *See id.*

The district court granted summary judgment in favor of the children.²⁵³ The cousins appealed arguing that ERISA preempts state probate law, which allowed for the appointment of an executor for Lurline's estate and the disclaimer made on behalf of Lurline's estate.²⁵⁴

The Fifth Circuit first addressed preemption.²⁵⁵ ERISA section 514(a) provides that ERISA preempts all state laws that "relate to" an employee benefit plan.²⁵⁶ Courts have construed the preemption clause broadly.²⁵⁷ A state law "relates to" a plan "if it has a connection with or reference to such a plan."²⁵⁸ The ERISA preemption clause, however, is not without limits.²⁵⁹ State actions may affect plans in "too tenuous, remote, or peripheral a manner to warrant" preemption.²⁶⁰

Based on these principles, the Fifth Circuit held that the district court erred in going "beyond the plain language of the plan to resolve the parties' dispute."²⁶¹ The district court improperly consulted the Texas Probate Code to interpret the plan.²⁶² As a result, the district court erred in even "reaching the preemption issue in the first place."²⁶³ The Fifth Circuit noted that the validity of the disclaimer can be determined "without going beyond the terms of the plan itself."²⁶⁴ Further, the court quoted with approval the Sixth Circuit's decision in *McMillan v. Parrott*: "ERISA plans are to be administered according to their controlling documents. . . . If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary."²⁶⁵

The court next examined de novo whether the disclaimer was valid under the terms of the plan.²⁶⁶ The plan provided:

In the event that *a Beneficiary or an entitled Beneficiary* signs and delivers to the Committee a written disclaimer of Plan benefits which satisfies the [Internal Revenue] Code's requirements to be tax qualified, and such benefits, but for the disclaimer, would otherwise pass *to such person* as a result of the death of a Participant or entitled Beneficiary, *the person*

253. *See id.*

254. *See id.*; *see also* 29 U.S.C. § 1144(a) (1994) (stating that "the provisions of this subchapter . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.").

255. *See Nickel*, 122 F.3d at 297.

256. 29 U.S.C. § 1144(a).

257. *See, e.g.*, *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992).

258. *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)).

259. *See Shaw*, 463 U.S. at 100 n.21.

260. *Id.*

261. *Nickel*, 122 F.3d at 298.

262. *See id.*

263. *Id.*

264. *Id.*

265. *Id.* (quoting *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990)).

266. *See id.*

executing such disclaimer of benefits shall be deemed to have failed to survive the deceased Participant or entitled Beneficiary from whom he otherwise would have taken.²⁶⁷

The court interpreted this to mean that a beneficiary, as defined by the plan, does not include an executor.²⁶⁸ The court looked at the plain meaning of the plan and concluded the following: "Clearly, the plan says nothing about anyone disclaiming on behalf of the beneficiary or entitled beneficiary. . . . In short, 'Beneficiary or an entitled Beneficiary' can mean nothing more than beneficiary or entitled beneficiary."²⁶⁹ The court concluded that because the executor, "rather than Lurline, signed and delivered to the Committee a written disclaimer, that disclaimer is invalid under the plan."²⁷⁰

The court rejected the children's argument that by referencing the Internal Revenue Code, the plan meant to adopt IRS rulings that allow a personal representative to disclaim a benefit on behalf of a decedent.²⁷¹ The court bluntly stated that "this . . . is irrelevant."²⁷² After analyzing the syntax of the sentence in the plan referring to the Internal Revenue Code, the court concluded that the children's argument was a "strained construction of the plan."²⁷³ The plan "clearly requires a beneficiary to sign and deliver a written disclaimer that *also* meets the Code's requirements for being tax qualified."²⁷⁴

Furthermore, the court held that even if an executor could sign a disclaimer on behalf of a beneficiary, the children still would not be entitled to the benefit.²⁷⁵ Once Lurline died, she was no longer the beneficiary, and her sister Annie became entitled to the benefits.²⁷⁶ Because Annie's will controlled the distribution of her estate, the cousins were entitled to receive the benefit.²⁷⁷

Judge Reynaldo Garza dissented.²⁷⁸ He would have held that "[a] plain meaning interpretation of 'beneficiary' will include agents and representatives of [the] beneficiary, because such interpretation is commonplace in the

267. *Id.* at 299 (alterations in original).

268. *See id.*

269. *Id.* at 298-99.

270. *Id.* at 298; *see* *Rodrique v. Western & So. Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 57 (4th Cir. 1991); *Bellimo v. Schlumberger Techs., Inc.*, 944 F.2d 26, 30 (1st Cir. 1991).

271. *See Nickel*, 122 F.3d at 299.

272. *Id.*

273. *Id.*

274. *Id.*

275. *See id.*

276. *See id.*

277. *See id.* at 301. In dicta, the court noted that "state law that determines who takes the proceeds under Annie's will does not relate to the plan and is not preempted." *Id.* at 300 n.4.

278. *See id.* at 301 (Garza, J., dissenting).

law."²⁷⁹ He cited with approval *Estate of Rolin v. Commissioner*²⁸⁰ in which the tax court held that executors have authority to disclaim property given to a testator beneficiary.²⁸¹ Judge Garza found support for this proposition in "[t]he fact that Texas, as well as many other states, considers executors to have certain powers of disclaimer."²⁸² Judge Garza found further support in the reference to a disclaimer that satisfies the requirements of the Internal Revenue Code.²⁸³ Judge Garza concluded that the reference to the Internal Revenue Code was "for the purpose of aiding in the definition of the requirements of an appropriate disclaimer, a definition which (in both plain usage and the Tax Code) includes executors."²⁸⁴

Moreover, Judge Garza agreed with the children's position because the phrase "Beneficiary or an entitled Beneficiary" was not used consistently throughout the plan.²⁸⁵ Sometimes the plan referred to a "person executing such disclaimer."²⁸⁶ The dissent concluded that

this further undermines the contention that the drafters intended a very strict and literal definition of beneficiary, one which would not encompass other persons such as executors or representatives. If that were the intent of the drafters, they . . . presumably would have consistently used the allegedly limiting phrases throughout this section of the plan.²⁸⁷

Judge Garza's final argument was equitable in nature. He argued that Benny would have preferred that the money go to his children rather than his cousins.²⁸⁸

I believe that the [children] are the appropriate recipients of the proceeds from the Plan for the simple reason that I find it difficult to believe that Benny Brooks Estes would want his hard-earned money to go to someone other than his immediate family. I suspect that Benny would turn over in his grave at the thought of such a distribution. Also, it has been stated that one of the primary goals of ERISA is to provide support for an employee and his family. A distribution of plan proceeds which favors the cousins of Benny Brooks Estes over his own children is not only likely to be exactly the

279. *Id.* at 302 (Garza, J., dissenting).

280. 68 T.C. 919 (1977), *aff'd*, 588 F.2d 368 (2d Cir. 1978).

281. *See Nickel*, 122 F.3d at 302 (Garza, J., dissenting).

282. *Id.* at 303 (Garza, J., dissenting).

283. *See id.* (Garza, J., dissenting).

284. *Id.* (Garza, J., dissenting).

285. *See id.* (Garza, J., dissenting).

286. *Id.* (Garza, J., dissenting).

287. *Id.* (Garza, J., dissenting).

288. *See id.* (Garza, J., dissenting).

opposite of what Benny would have wanted, but is also not in keeping with the goals of ERISA.²⁸⁹

Judge Garza preferred affirmation of the district court's decision as being "the more just result" and the one making more sense.²⁹⁰

E. Employees Who Want to Retire and Work Too

It is not very often that courts hear a suspension of benefits case. These cases typically arise when a union employee retires and then goes to work for a nonunion employer. Under regulations issued by the Department of Labor, the pension fund can suspend the retiree's pension benefits during the time that the retiree continues to work for the nonunion employer.²⁹¹

The validity of a suspension of benefits clause was at issue in *Spacek v. Maritime Ass'n*.²⁹² The pension plan in that case provided as follows:

If a Retired Participant is reemployed in the industry prior to his Normal Retirement Age, payment of his . . . Pension . . . Benefit, if any, shall immediately cease and he shall immediately become an Active Participant. Such a Participant shall not be entitled to [a] . . . Pension . . . Benefit while he continues to be employed in the industry or, if greater, for a period of six (6) months measured from the due date of the first monthly installment of his . . . Pension which is withheld pursuant to this Paragraph.²⁹³

Thus, if a retiree is "reemployed in the industry," the pension fund must suspend the retiree's benefits for the period of employment or six months, whichever is longer.²⁹⁴

The plan defined "employment in the industry" as a Participant's employment "during a month if, and only if, both of the following conditions are met."²⁹⁵

- (i) [H]e is employed in the same industry, in the same trade or craft, and in the same geographic area covered by this Plan, as when he first became eligible for such pension; and
- (ii) he is credited with at least one (1) Credit Hour for the Payroll Period ending in such month.²⁹⁶

289. *Id.* (Garza, J., dissenting) (citations omitted).

290. *Id.* at 304 (Garza, J., dissenting).

291. See 29 C.F.R. § 2530.203-3(a) (1998).

292. 134 F.3d 283, 288 (5th Cir. Jan. 1998).

293. *Id.* at 286.

294. See *id.*

295. *Id.*

296. *Id.*

In 1991, the trustees amended the definition of "employment in the industry," deleting the second requirement quoted above.²⁹⁷ The effect of this amendment was that retirees who returned to work would have their benefits suspended regardless of whether they went to work for a union or nonunion employer and regardless of whether they worked in a collective bargaining unit.²⁹⁸

In 1994, Daniel Spacek came out of retirement to work for a union employer as a supervisor.²⁹⁹ The trustees suspended his benefits for six months.³⁰⁰ As a supervisor, Spacek was not covered by the collective bargaining agreement, and therefore, his employer was not required to make pension contributions on his behalf.³⁰¹ Consequently, he did not receive any credits under the plan.³⁰²

Spacek sued the plan to recover his suspended benefits, arguing that under the provision in effect at the time he retired, his benefits could only be suspended if he received at least one hour of credit with a signatory employer.³⁰³ Because no hours were credited on his behalf, he argued that the plan administrator improperly suspended his benefits.³⁰⁴ The district court held that the suspension of Spacek's benefits "was arbitrary and capricious because it deprived him of rights that vested contractually at the time of his retirement."³⁰⁵

The Fifth Circuit reviewed the district court's decision *de novo* because it involved a question of statutory interpretation.³⁰⁶ Spacek argued that the plan amendment violated ERISA's anticutback rule.³⁰⁷ The anticutback rule provides that "the accrued benefit of a participant under a plan may not be decreased by an amendment of the plan."³⁰⁸ An amendment that eliminates or reduces an early retirement benefit is considered a reduction of accrued benefits.³⁰⁹ Spacek argued that a reduction in benefits occurred "because he will never recover those suspended benefits and thus the cumulative total of benefits he will receive over his lifetime has been reduced."³¹⁰

297. *See id.*

298. *See id.*

299. *See id.* at 286-87.

300. *See id.*

301. *See id.* at 287.

302. *See id.*

303. *See id.*

304. *See id.*

305. *Id.*

306. *See id.* at 287-88 (citing *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100 (5th Cir. 1990)).

307. *See id.* at 288; 29 U.S.C. § 1054(g)(1) (1994).

308. 29 U.S.C. § 1054(g)(1).

309. *See id.* § 1054(g)(2).

310. *Spacek*, 134 F.3d at 288 (emphasis added).

The court rejected Spacek's argument because it was "contrary to the wording of the ERISA statute."³¹¹ ERISA regulations distinguish between reductions and suspensions.³¹² For example, an ERISA regulation requires a summary plan to describe any plan provision under which a benefit may be "reduced, changed, terminated, forfeited or suspended."³¹³ The Fifth Circuit held that under the canons of statutory construction, "each word must be given meaning."³¹⁴ Congress is assumed to have applied different meanings to different words.³¹⁵ The court concluded that "under the plain language of the statute, a suspension of benefit payments is not a reduction of benefits."³¹⁶ Therefore, the court affirmed the district court's determination that the amendment did not violate the anticutback rule.³¹⁷

This conclusion was further supported by the legislative history of the Retirement Equity Act of 1984.³¹⁸ During Congressional debate, the sponsor of the bill stated that "I wish to further clarify [that] the anticutback provisions . . . are not intended to apply to benefit changes authorized by existing law; for example, they do not restrict the right of multiemployer pension plans . . . to . . . suspen[d] . . . benefits for postretirement employment."³¹⁹

ERISA section 204(g) only prohibits the reduction of accrued benefits.³²⁰ Accrued benefits are defined as the actuarial equivalent of an annual benefit commencing at normal retirement age.³²¹ Treasury regulations provide that "for purposes of computing the actuarial equivalent of a retirement benefit available at normal retirement age, 'no adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] section 203(a)(3)(B).'"³²²

The court next addressed the plan's argument that application of contract law was inappropriate as it would establish a federal common law that is contrary to the intent of ERISA.³²³ The court rejected this argument stating that "an employer can oblige itself contractually to maintain benefits at a certain level in ways that are not mandated by ERISA."³²⁴

311. *Id.*

312. *See id.* at 288 n.6 (citing *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995)).

313. 29 C.F.R. § 2520-104b-4(a)(1)(iii), (2)(iv) (1998).

314. *Spacek*, 134 F.3d at 289 (citing *Bailey v. United States*, 516 U.S. 137, 143-45 (1995)).

315. *See Bailey*, 516 U.S. at 143-45.

316. *Spacek*, 134 F.3d at 289.

317. *See id.*

318. *See id.*; 29 U.S.C. § 1054(g)(2) (1994).

319. *Spacek*, 134 F.3d at 289 (alterations in original) (quoting 130 CONG. REC. 23,487 (1984)).

320. *See* 29 U.S.C. § 1054(g).

321. *See Spacek*, 134 F.3d at 290 (citing 29 U.S.C. § 1054(c)(3)).

322. *Id.* (quoting 26 C.F.R. § 1.411(c)-(f) (1998)).

323. *See id.* at 292.

324. *Id.* (quoting *Vasseur v. Halliburton*, 950 F.2d 1002, 1006 (5th Cir. 1992)).

The Fifth Circuit reviewed the district court's decision on this matter under the abuse of discretion standard as required by *Firestone* when the plan grants discretionary authority to an administrator.³²⁵ The court observed that an employer's agreement to provide protections greater than those required by ERISA must be recorded in the plan documents "in clear and express language."³²⁶ This is especially true with respect to welfare plans that are not required to vest.³²⁷

Courts have strongly protected the sanctity of the employer's right to change welfare benefits, even lifetime benefits, at any time and for any reason. For instance, in *Chiles v. Ceridian Corp.*, the Tenth Circuit stated, "We recognize that the weight of case authority supports the . . . approach, that a reservation of rights clause allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits."³²⁸

The Fifth Circuit applied the same analysis used in the welfare cases to Spacek's pension claim.³²⁹ Acknowledging that most courts give more protection to pension benefits than welfare benefits,³³⁰ the court noted that "[t]his tendency doubtless stems from the special solicitude that courts have shown in protecting the rights of pensioners, who have labored the greater portion of their lives under an expectation that their hard work would bring them security in retirement."³³¹ The court stated that

[b]ecause Congress has chosen to protect pensioners' expectations of retirement security statutorily, the courts need not endeavor—and indeed have no justification for endeavoring—to safeguard pensioners' interests by liberally applying equity-based theories of contract construction that deviate from contract law's traditional focus on the intent of the parties as determined by the objective manifestations of that intent contained in the language of the parties' agreement.³³²

The court concluded that the administrator's interpretation of the plan was legally correct, thereby satisfying the first prong of the abuse of discretion analysis.³³³ A broad amendment clause in the pension plan allowed a plan administrator "to adopt any amendment that comports with ERISA's statutory

325. See *id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

326. *Id.* at 293.

327. See *id.*

328. 95 F.3d 1505, 1521 n.2 (10th Cir. 1996); see *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 905-06 (3d Cir. 1996); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994).

329. See *Spacek*, 134 F.3d at 294-95.

330. See *id.*

331. *Id.* at 295.

332. *Id.*

333. See *id.* at 298.

requirements."³³⁴ The court said that this broad right to amend "does not render . . . the plan illusory because the plan administrators are bound to exercise their amendment power in a manner that comports with ERISA's minimum statutory requirements."³³⁵ The court noted that even if it applied the doctrine of *contra proferentum* to construe an ambiguous plan's provisions against the plan, the amendment as applied to Spacek still was not an abuse of discretion.³³⁶

The second prong of the abuse of discretion standard requires the court to look at the following factors in determining whether an abuse of discretion occurred: "(1) the internal consistency of the plan under the administrator's interpretation, (2) any relevant regulations formulated by the appropriate administrative agencies, and (3) the factual background of the determination and any interferences of lack of good faith."³³⁷

Based on these factors, the court held that the plan administrator did not abuse his discretion.³³⁸ The amendment as applied to Spacek did not render the plan internally inconsistent.³³⁹ The amendment violated no administrative regulations, and in fact, it complied with the Treasury regulations.³⁴⁰ Finally, there was no evidence of bad faith in applying the amendment to Spacek.³⁴¹ Rather, the "[p]lan made a good faith decision to conserve its resources for participants who had truly decided to retire and not reenter the local longshoring industry."³⁴² The Fifth Circuit concluded that even if the amendment was ambiguous, the administrator did not abuse its discretion in applying the amendment to Spacek.³⁴³

IV. STANDARD OF REVIEW IN BENEFIT DENIAL CASES

A. *The Appropriate Standard of Review*

In *Firestone Tire & Rubber Co. v. Bruch*, the United States Supreme Court held that "a denial of benefits . . . is to be reviewed under a *de novo* standard unless a benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."³⁴⁴ According to the Fifth Circuit, the following is an

334. *Id.*

335. *Id.*

336. *See id.*

337. *Id.* at 299; accord *Batchelor v. IBEW Local 861*, 877 F.2d 441, 445-48 (5th Cir. 1989).

338. *See Spacek*, 134 F.3d at 299.

339. *See id.*

340. *See id.*

341. *See id.*

342. *Id.*

343. *See id.*

344. 489 U.S. 101, 115 (1989).

example of plan language that confers such discretionary authority: “[T]he [A]dministrator is empowered to ‘make such rules, regulations, [and] interpretations . . . and [to] take such other action . . . as [he] may deem appropriate.’ ”³⁴⁵ However, courts have held that no magic words confer discretionary authority on a plan administrator.³⁴⁶ The language of each plan must be examined separately to determine if discretionary authority has been conveyed.³⁴⁷

Surprisingly, many of the cases decided this term were reviewed de novo because the plan did not grant discretionary authority to the administrator.³⁴⁸ This appears to be caused by oversight on the part of attorneys who represent employee benefit plans. In the nearly ten years since the Supreme Court decided *Firestone*, plan attorneys have failed to advise trustees to amend their trust agreement to grant discretionary authority to the administrator and trustees. The simple act of granting discretionary authority to a plan fiduciary changes the standard of review from de novo to abuse of discretion.³⁴⁹ The abuse of discretion standard is preferable from the plan’s viewpoint because it weeds out cases brought by participants who merely want a second opinion. It also imposes a greater burden on the plaintiff because he or she must show that the plan’s action was arbitrary and capricious.³⁵⁰ On the other hand, when a court reviews a denial of benefits de novo, the court reviews all of the evidence and “look[s] to the terms of the plan and other manifestations of the parties’ intent.”³⁵¹

B. A Case Study

In *Branson v. Greyhound Lines, Inc.*, the Fifth Circuit held that the plan administrator did not abuse its discretion when it denied experience-based seniority to Branson.³⁵² Branson resigned in 1987 with 10.18 years of service.³⁵³ Three years later, he returned to work at Greyhound as a strike

345. *Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local 4-447*, 47 F.3d 139, 143 (5th Cir. 1995) (alterations in original). The Fifth Circuit has also held that the following language was sufficient to convey discretionary authority to the trustees: The trustees have power “to decide any question arising in the administration, interpretation, and application of this Plan.” *Barhan v. Ry-Ron, Inc.*, 121 F.3d 198, 201 (5th Cir. Sept. 1997). Likewise, the following language was also sufficient to convey discretionary authority to a plan administrator: “[T]he Administrator has the sole authority and responsibility to review and make final decisions on all claims to benefit hereunder.” *Chevron Chem. Co.*, 47 F.3d at 142.

346. *See, e.g., Branson v. Greyhound Lines, Inc.*, 126 F.3d 747, 757 (5th Cir. Oct. 1997).

347. *See id.*

348. *See, e.g., Chevron Chem. Co.*, 47 F.3d at 142.

349. *See Dowden v. Blue Cross & Blue Shield*, 126 F.3d 641, 643-44 (5th Cir. Sept. 1997).

350. *See id.* at 644.

351. *Sunbeam-Oster Co. Group Benefits Plan for Salaried and Non-Bargaining Hourly Employees v. Whitehurst*, 102 F.3d 1368, 1373 (5th Cir. 1996) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-113) (1989)).

352. 126 F.3d 747, 749 (5th Cir. Oct. 1997).

353. *See id.*

replacement.³⁵⁴ By this time, the 1987 collective bargaining agreement under which Branson had previously been employed had expired, and negotiations had started toward a new contract.³⁵⁵ Greyhound had proposed a contract clause "designed to encourage experienced drivers to cross the picket line."³⁵⁶ Under the guise of "Experience Based Seniority" (EBS), Greyhound offered to grant super-seniority to all replacement workers and returning strikers.³⁵⁷ Employees entitled to EBS would receive credit not only for years of service with Greyhound, but also for driving experience gained while working for other commercial employers.³⁵⁸ The union rejected the proposal, and "Greyhound informed the Union that it would not abandon this program under any circumstances and began implementing EBS without further negotiations."³⁵⁹ The union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) because Greyhound had unilaterally implemented a benefit increase.³⁶⁰ The NLRB determined that Greyhound had committed an unfair labor practice and ordered Greyhound to "eliminate all effects of EBS by all appropriate means."³⁶¹ In response, Greyhound implemented a buy-out program in which it offered cash to employees who had earned EBS.³⁶² Employees were required to sign a waiver as part of the buy-out program.³⁶³

Branson refused to sign the waiver.³⁶⁴ He insisted "that he wanted his additional seniority credit rather than the cash buy-out."³⁶⁵ He sued the plan for a declaratory judgment.³⁶⁶ The district court held that the plan fiduciaries did not abuse their discretion by denying Branson additional seniority credit, and Branson appealed.³⁶⁷

The Fifth Circuit looked to the plan to determine whether the plan conferred discretionary authority on the trustees.³⁶⁸ The plan stated that the trustees have the power "to decide any question arising in the administration, interpretation, and application of this Plan."³⁶⁹ The court held that this

354. *See id.*

355. *See id.*

356. *Id.*

357. *Id.* at 750.

358. *See id.*

359. *Id.*

360. *See id.*

361. *Id.*

362. *See id.*

363. *See id.*

364. *See id.*

365. *Id.*

366. *See id.*

367. *See id.*

368. *See id.* at 756.

369. *Id.*

language conferred discretionary authority on the trustees, and therefore, the district court had correctly applied the abuse of discretion standard.³⁷⁰

Branson argued that the trustees were subject to a "suspicion of partiality"³⁷¹ because the plan was operated by a joint board of trustees, three of whom were selected by the union and three of whom were selected by Greyhound.³⁷² According to Branson, this conflict required the application of a lower standard of review than the abuse of discretion standard.³⁷³ The court rejected this argument, noting that none of these trustees "[had] an interest in helping former strike-breakers."³⁷⁴ The district court found that neither Greyhound nor the union displayed any animosity toward the replacement workers.³⁷⁵ Specifically, the court noted that after the strike, the union assisted Branson in pursuing a grievance against Greyhound, thus showing no animus against him as a replacement striker.³⁷⁶ Therefore, the court affirmed the district court's refusal to use "suspicion of partiality" as a factor in determining whether the trustees had abused their discretion.³⁷⁷

The court reviewed de novo the district court's conclusion that the trustees did not abuse their discretion in failing to grant Branson EBS.³⁷⁸ The court applied a two-step inquiry to determine whether the trustees abused their discretion.³⁷⁹ First, the court considered whether the trustees interpreted the plan in a "legally correct" manner.³⁸⁰ In deciding whether the interpretation was legally correct, the court considered three factors: "(1) whether the Trustees [gave] the pension plan a uniform construction; (2) whether the Trustees' interpretation [was] consistent with a fair reading of the Plan; and (3) whether different interpretations of the plan [resulted] in unanticipated costs."³⁸¹ Second, if the trustees were not legally correct in interpreting the plan, the court had to decide whether the trustees' decision was an abuse of discretion.³⁸²

In determining whether the trustees' interpretation was legally correct, the court held that the first factor was insignificant because the trustees had

370. *See id.*

371. *Id.*

372. *See id.* at 756 n.6.

373. *See id.* at 757 (citing *Lowry v. Bankers Life and Cas. Retirement Plan*, 871 F.2d 522, 525 & n.6 (5th Cir. 1989)).

374. *Id.* at 756 n.6.

375. *See id.* at 757.

376. *See id.*

377. *Id.*

378. *See id.* (citing *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994)).

379. *See id.* (citing *Pickrom v. Belger Cartage Serv. Inc.*, 57 F.3d 468, 471 (5th Cir. 1995)).

380. *Id.*

381. *Id.* (citing *Chevron Chem. Co. v. Oil, Chem. & Atomic Workers Local 4-447*, 47 F.3d 139, 145 (5th Cir. 1995)).

382. *See id.*

not previously interpreted the relevant provisions.³⁸³ The third factor—whether the interpretation resulted in unanticipated costs—supported the trustees' interpretation.³⁸⁴ The court stated that the trustees' interpretation was "designed to thwart the very unanticipated costs that Branson's interpretation inevitably would produce."³⁸⁵ The court stated that "attempting to arrange actuarially for the possibility that these [former] employees might reenter the Plan at any moment, demanding immediate recognition of substantial terms of seniority, [would] certainly result[] in unanticipated costs."³⁸⁶

The trustees also met the second factor, which required a "fair reading of the Plan."³⁸⁷ The Plan provided as follows:

Notwithstanding anything to the contrary in this Section 2.1(1), however, an Active Participant who subsequently terminates employment with an Employer and thereupon loses his seniority under the Collective Bargaining Agreement . . . shall thereafter cease to be an Active Participant regardless of whether such Participant is subsequently re-employed by an Employer or a Related Employer.³⁸⁸

According to the Plan, only active participants may accrue pension credit or benefits under the Plan.³⁸⁹ The court noted that in 1987, Branson, an active participant, terminated his employment with Greyhound.³⁹⁰ As a result, the trustees were required to determine whether Branson, upon termination, lost his seniority under the collective bargaining agreement.³⁹¹ The trustees determined that when Branson stopped working for Greyhound, he lost his seniority and "cease[d] to be an Active Participant" in the Plan, and as such "could no longer accrue additional pension credit" even if he was subsequently reemployed.³⁹² The Fifth Circuit concluded that the trustees' interpretation was reasonable.³⁹³ Because the court found the trustees' decision to be legally correct, the court did not proceed further in its analysis.³⁹⁴

383. *See id.*

384. *See id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *See id.*

390. *See id.*

391. *See id.*

392. *Id.*

393. *See id.* at 758.

394. *See id.* (citing *Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 472-73 (5th Cir. 1995)).

V. MISCELLANEOUS CASES

A. Collateral Estoppel

In *Stafford v. True Temper Sports*, the Fifth Circuit held that an employee fired for gross misconduct who appealed the denial of his unemployment compensation benefits was collaterally estopped from bringing an action under ERISA section 510 because the same issues would be relitigated.³⁹⁵ Bobby Stafford was fired by True Temper Sports's Amory, Mississippi facility for violating company policy by manipulating the employer's machinery to make it look like he worked more hours than he actually worked, so that he could receive greater pay.³⁹⁶ Stafford applied for and was denied unemployment benefits.³⁹⁷ On appeal, the hearing examiner's decision to deny Stafford's benefits was reversed.³⁹⁸ On further appeal, the board of review reversed the hearing examiner's decision, holding that "Stafford intentionally manipulated the machinery to make it appear that he was working longer hours than he actually had worked, and . . . disqualif[ied] Stafford from unemployment benefits."³⁹⁹ Stafford filed an appeal in state court and lost there as well.⁴⁰⁰

Stafford filed suit in federal court alleging that he was fired to prevent his benefits from vesting in True Temper's pension plan.⁴⁰¹ On the date he was fired, Stafford "was three (3) weeks away from being vested."⁴⁰² Stafford also alleged that he was fired in retaliation for present and future medical benefits incurred by his daughter, a beneficiary of the plan, who suffered from Gaucher's disease.⁴⁰³ Additionally, Stafford alleged that he was fired in retaliation for his own medical expenses, which were substantial because he underwent heart surgery.⁴⁰⁴ In sum, Stafford alleged that his dismissal for gross misconduct was pretextual.⁴⁰⁵ However, the district court granted summary judgment in favor of True Temper.⁴⁰⁶

The Fifth Circuit reviewed de novo the lower court's grant of summary judgment.⁴⁰⁷ The Fifth Circuit held that "federal courts must give an agency's

395. 123 F.3d 291, 293 (5th Cir. Sept. 1997). Section 510 makes it unlawful for an employer to retaliate against an employee for exercising his or her rights under ERISA. See 29 U.S.C. § 1140 (1994).

396. See *Stafford*, 123 F.3d at 293.

397. See *id.*

398. See *id.*

399. *Id.*

400. See *id.*

401. See *id.*

402. *Id.*

403. See *id.* at 294.

404. See *id.* at 293.

405. See *id.* at 294.

406. See *id.*

407. See *id.*

fact finding the same preclusive effect that they would [give] a decision of a state court, when the state agency is acting in a judicial capacity and gives the parties a fair opportunity to litigate."⁴⁰⁸ An exception occurs when Congress has demonstrated its intent that state administrative decisions not preclude a plaintiff from bringing a similar cause of action.⁴⁰⁹ The Fifth Circuit held that no such exception applied here, and therefore, Stafford's claim was barred by collateral estoppel.⁴¹⁰

The court rejected Stafford's contention that he did not have an opportunity to litigate the retaliation claim.⁴¹¹ The court noted that Stafford "had ample opportunity to litigate his claim,"⁴¹² stating that "[t]he fact that he may not have used certain strategies or litigated to the extent that (in hindsight) he and his attorney now believe he should have is immaterial."⁴¹³ Stafford's claims were reviewed by an administrative body, as well as a state court.⁴¹⁴ The state court's decision is entitled to "the same full faith and credit in every court of the United States . . . as [it has] by law or usage in courts of such State."⁴¹⁵

In order for a prior judgment to have a collateral estoppel effect under Mississippi law, the party must be seeking to relitigate an issue that was litigated and decided in a prior action, and determination must have been essential to the prior action.⁴¹⁶ These factors were present here. The main issue in the hearings reviewing the denial of Stafford's unemployment compensation was whether Stafford had manipulated the equipment and whether he was fired for such tampering.⁴¹⁷ The Fifth Circuit held that these issues were litigated in the administrative proceedings and the state litigation.⁴¹⁸ Stafford argued that because the prior litigation concerned the reason for his dismissal, he should not be collaterally estopped from alleging that the machine tampering claim was pretextual, and that the real reason for his termination was retaliation for exercising his rights under ERISA.⁴¹⁹ The court rejected Stafford's contention that the ERISA retaliation claim was not litigated.⁴²⁰

ERISA section 510 requires a participant to prove that the employer fired the employee with specific intent to retaliate against the employee for

408. *Id.* (citing *University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986)).

409. *See id.*

410. *See id.*

411. *See id.*

412. *Id.*

413. *Id.*

414. *See id.* at 295.

415. *Id.* (quoting 28 U.S.C. § 1738).

416. *See id.*

417. *See id.*

418. *See id.*

419. *See id.*

420. *See id.*

exercising ERISA rights or to prevent the employee's benefits from vesting.⁴²¹ The Fifth Circuit noted that the plaintiff "need not prove that the discriminatory reason was the only reason for discharge, but he must show that the loss of benefits was more than an incidental loss from his discharge, and this influence of discrimination can be proven by circumstantial evidence."⁴²² Stafford's employer gave an appropriate nondiscriminatory reason for firing Stafford.⁴²³ Because Stafford failed to prove that the allegation of gross misconduct was a pretext, the lower court did not err in applying the doctrine of collateral estoppel.⁴²⁴

B. Failure to Support Motion for Summary Judgment with Adequate Affidavits

In *Barhan v. Ry-Ron, Inc.*, the Fifth Circuit reversed the district court's grant of summary judgment for the plan when the plan administrator did not adequately support the motion with affidavits.⁴²⁵ Constance Barhan was diagnosed with breast cancer, and her physician recommended a treatment of high-dose chemotherapy with peripheral stem-cell support.⁴²⁶ The plan administrator refused to precertify the treatment because as an experimental or investigational procedure, it was excludible under the plan.⁴²⁷

Bahran filed an action for a declaratory judgment that the high-dose chemotherapy was covered by the plan.⁴²⁸ The district court held that the treatment was excluded from coverage under the plan.⁴²⁹ Bahran appealed.⁴³⁰

The Fifth Circuit reviewed de novo the district court's ruling on whether the plan administrator abused its discretion.⁴³¹ The district court's review under the abuse of discretion standard was appropriate because the plan gave the administrator discretionary authority to determine eligibility for benefits.⁴³² The plan provided that "the Administrator has the sole authority and responsibility to review and make final decisions on all claims to benefits hereunder."⁴³³

421. See 29 U.S.C. § 1140 (1994).

422. *Stafford*, 123 F.3d at 295.

423. See *id.*

424. See *id.*

425. 121 F.3d 198, 200 (5th Cir. Sept. 1997).

426. See *id.*

427. See *id.*

428. See *id.*

429. See *id.*

430. See *id.*

431. See *id.* at 201 (citing *Sweatman v. Commercial Union Ins. Co.*, 39 F.3d 594, 601 (5th Cir. 1994)).

432. See *id.* (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)).

433. *Id.*

A district court's grant of summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law."⁴³⁴ Although the plan administrator submitted various documents and affidavits in support of its motion for summary judgment, the district court did not review this evidence because Bahran did not submit "the administrative record upon which the [p]lan made its decision" in accordance with Rule 11(a) of the Federal Rules of Appellate Procedure.⁴³⁵

The Fifth Circuit reversed the district court's summary judgment.⁴³⁶ The court held that Rule 11(a) was not applicable and that the plan administrator was responsible for compiling a record that supports its decision under 29 C.F.R. § 2560.503-1(f).⁴³⁷ The court concluded that "as a practical matter, the plan administrator is ordinarily best-positioned to submit that administrative record."⁴³⁸ Under the rules governing summary judgment, as movant, "the [p]lan bore the initial burden of informing the Court of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits or other factual support that demonstrate that it did not abuse its discretion in rejecting the beneficiary's claim."⁴³⁹ In response, Bahran had the responsibility of setting forth evidence to establish that a genuine issue of material fact existed.⁴⁴⁰

The Fifth Circuit held that the plan submitted various documents and affidavits that the court erroneously refused to review because Bahran did not submit an administrative record.⁴⁴¹ The court further held that a review of the plan's supporting documents required the conclusion that the plan should not have been granted summary judgment.⁴⁴² The plan rested its entire support for the claim that the treatment was experimental on an affidavit of the plan administrator that relied "chiefly on hearsay evidence."⁴⁴³ The plan did not attach to the affidavit any of the documents cited in the affidavit.⁴⁴⁴ Moreover, the plan did not submit an affidavit by the plan's expert.⁴⁴⁵ The Fifth Circuit concluded that on the basis of this inadequate information, the district court erred in granting the plan's motion for summary judgment.⁴⁴⁶

434. *Id.* (citing FED. R. CIV. P. 56(c)).

435. *Id.*

436. *See id.*

437. *See id.*

438. *Id.*

439. *Id.* at 202.

440. *See id.*

441. *See id.*

442. *See id.*

443. *Id.*

444. *See id.*

445. *See id.*

446. *See id.*

VI. CONCLUSION

This term the Fifth Circuit addressed a number of issues dealing with employee benefits. The Fifth Circuit drew a line between vested employee benefits that are nonforfeitable and nonvested benefits that are merely gratuities to be withdrawn at the whim of the employer. Employees who abused their rights lost, while entitled employees won. And a few *Varity* type claims surfaced,⁴⁴⁷ but all were rejected.

447. See *Varity v. Howe*, 516 U.S. 489 (1996).

